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IN THE

Supreme Court of the United States

October Term, 1965
No. .....

STEPHAN RIESS and THELMA McKINNEY RIESS,
Petitioners,

vs.

C. W. MURCHISON, JOHN MURCHISON, GERALD C. MANN, RUSSELL ALLEN, MARTHA COLON, MURMANILL CORPORATION, a Texas corporation, DIVERSA, INC., a Delaware corporation, KADOTA DEVELOPMENT COMPANY, INC., a Delaware corporation, DIXIE PIPE LINE COMPANY, a Delaware corporation, changed to SIMI VALLEY DEVELOPMENT COMPANY, a corporation, DIVERSA-CAL PROPERTIES, INC., a Nevada corporation, DIVERSA-CAL DEVELOPMENT COMPANY, a Nevada corporation, PACIFIC WESTERN PROPERTIES, INC., a Nevada corporation,
Respondents.

Brief for Respondents in Opposition to Petition for a Writ of Certiorari.

Opinions Below.

There was no written opinion of the United States Court of Appeals for the Ninth Circuit other than the *per curiam* Order affirming the judgment of dismissal of the District Court and denying the Motion to Vacate Judgment and Order of Dismissal. This Order and all other orders and written memoranda of the District Court are accurately reproduced in the appendices to the Petition.

Jurisdiction.

Jurisdiction of the United States Supreme Court to review the order of the Court of Appeals is conferred by 28 U.S.C. §1254(1).

Question Presented.

On many occasions, both in open Court and through written memoranda, petitioners were advised of the requirements of pleading diversity jurisdiction under 28 U.S.C. §1331(a)(1) and §1332(c). The Complaint was never conformed to these requirements.

The question presented is whether the District Court abused its discretion in dismissing the Amended Complaint, and whether the Court of Appeals committed error in its affirmance thereof and denial of the motion to vacate.

Statement of Facts.*

On March 1, 1963, petitioners filed suit against five individual and seven corporate defendants** (respondents herein).

On April 3, 1963, motions were filed by respondents under Rules 12(b)(1), 12(b)(2) and 12(b)(6) F.R.C.P. [C. T. pp. 41, 51] and on May 13, 1963, came on for hearing, the Court quashing service on the individual respondents under Rule 4(f) F.R.C.P. [C.

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*Page references to the Reporter's Transcript of Proceedings and to the Clerk's Transcript of Record on Appeal are preceded by "R. T." and "C. T." respectively.

**Purported service of process was effected on all except Kadota Development Company, Inc. and the Doe defendants.

T. p. 136]. Determination of the remaining portions of the motions was deferred. In the interim, on July 3, 1963, additional motions were filed under Rule 12(b)-(2) F.R.C.P. [C. T. p. 138].

On April 12, 1963, all pending motions were heard and the Court filed its Memorandum and Order on October 10, 1963. (Petition, App. B). As a part of this Order petitioners were directed to file a more definite statement as requested in the original motions [C. T. pp. 41, 51].

In response to the Order of October 10, 1963, directing a more definite statement, but not in conformity therewith, petitioners filed an amended complaint [C. T. p. 183].

After service on respondents Murmanill Corporation and Diversa, Inc., pursuant to *ex parte* order [C. T. p. 218; Petition, App. C]; and after renewed motions under Rules 12(b)(2) and 12(b)(1) F.R.C.P. [C. T. pp. 219, 224]; all pending motions came on for hearing on September 30, 1964, and the Court dismissed the Complaint by written Order and memorandum of the same date [C. T. p. 274; Petition, App. D]. The basis of dismissal was lack of federal diversity jurisdiction due to (1) failure to allege the principal place of business of the corporate defendants as required under 28 U.S.C. §1332(c), and (2) failure to plead "citizenship" in accordance with 28 U.S.C. §1332 as to the individual defendants. The Court found it unnecessary to consider the other grounds urged for dismissal.

Final judgment of dismissal was entered October 9, 1964 [C. T. p. 278; Petition, App. E].

October 12, 1964, petitioners moved the District Court to vacate the Judgment and Order of dismissal under Rule 59(e) F.R.C.P. [C. T. pp. 281, 295]. This motion was denied by order dated November 5, 1964 [C. T. p. 319; Petition, App. F].

The Court of Appeals for the Ninth Circuit affirmed the judgment of dismissal and denial of the motion to vacate [Petition, App. G]. On October 14, 1965, a petition for rehearing was denied (Petition, App. H).

That neither the original nor the amended Complaint contained the requisite allegations to establish federal jurisdiction has been argued by respondents; found to be true by the Court; and, indeed, admitted by petitioners in open Court [R. T. p. 51] and in their Petition to this Court [Petition, pp. 5, 7].

ARGUMENT.

I.

There Was Not an Abuse of Discretion by the District Court in Dismissing the Amended Complaint.

Petitioners have included in their Petition a section entitled "The Gist of the Problem," authority for which we do not find either in 28 U.S.C. §1254 or Rule 40 of the Rules of the Supreme Court. For purposes of reply we consider this section a part of the "argument" as provided for under Rule 40(g).

As preface to attacking the issues one must focus on the reasons for the dismissal of the Amended Complaint. The District Court found that there was a total failure on the part of petitioners to *plead* the principal place of business of any of the corporate defendants or the citizenship of the individual defendants. For a court to decide such a question it has but one place to look—the complaint.

Haley v. Childers, 314 F. 2d 610, 613 (8 Cir. 1963);

Patton v. Baltimore & O. R. Co., 197 F. 2d 732, 743 (3 Cir. 1952);

Peoples Bank v. Rue, 210 F. Supp. 952, 953 (D.C. Iowa 1962).

The many words offered the court in argument which relate to affidavits and extrinsic evidence are totally irrelevant as the issue was not one of *testing allegations in a Complaint; Shahmoon Industries, Inc. v. Imperato,* 338 F. 2d 449 (3 Cir. 1964), or treating a Rule 12(b)(6) motion as one for summary judgment; *Mantin v. Broadcast Music, Inc.,* 248 F. 2d 530 (9 Cir.

1957), but rather, of determining whether certain facts had been *alleged* at all. The issue resulting in the dismissal was one of *pleading—of allegation; not of sufficiency or proof of allegations* which had been pleaded and appeared on the face of the Complaint. Let us turn now to the Petition.

There are no alleged conflicts in the Circuits nor is it suggested there is an important question of federal law at stake. The basis of the Petition lies in Rule 38(5)(b) (Rules of the Supreme Court) providing that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." In effect, petitioners are saying that the Amended Complaint was insufficient because their lawyer was inept and further that the trial Court was unfair and abused its discretion in not allowing further amendment. Nowhere is it suggested that the amendment was not made because in the good conscience of trial counsel it could not be made. Whether this latter surmise be true or not is unimportant. The fact remains that the critical allegations were absent — absent after repeated admonition by counsel for respondents and the Court.

As early as April 3, 1963, over six months before the Amended Complaint was filed, respondents cited the law of total diversity at length in their memorandum of points and authorities which was submitted to the Court *and counsel* [C. T. pp. 75, 88; pp. 10-11 of memo].

> "So far as the corporate defendants are concerned, again plaintiffs are obliged affirmatively to

show diverse citizenship, and this cannot be done merely by an allegation as to the state of incorporation. Title 28, section 1332(c) provides, in effect, that a corporation has dual citizenship, that is, it is to be deemed a corporation of the state of its incorporation and of the state where it has its principal place of business. It is clear that the complaint is defective in that it does not contain allegations with respect to the principal place of business of the corporate defendants."

At the hearing of August 12, 1963, after the Court allowed petitioners to cure a similar jurisdictional defect by interlining the word "citizen" in place of "resident" as it applied to the petitioners, counsel for respondents emphasized the corporate dual citizenship and total diversity requirement in open Court: [C. T. p. 18]

"Mr. Kadison: But the more serious defect, if it please the court, and the one I don't believe can be cured by interlineation is the failure to comply with what I call Section 1334 of Title 28, which is really 1332(c) of Title 28—every time I read the Code section I think of something important — which provides, in effect, that a corporation has dual citizenship, and not only must it be alleged that it is a corporation in another jurisdiction but also it must be made clear by allegation that the corporation has no principal place of business in this jurisdiction."

The Court also told counsel there must be total diversity [C. T. pp. 19-20]:

"The Court: On the matter of diversity, Mr. Schwartz, THERE MUST BE COMPLETE DIVERSITY.

> In other words, part of the defendants can be residents of Texas and part of them of California, but if any single one is a resident of California your whole action fails in the federal court for lack of jurisdiction, and apparently from the face of your complaint you have alleged here that Diversa, Inc., Kadota Development Company, Inc., Dixie Pipeline Company, Simi Valley Development Company were and now are corporations existing under the laws of Delaware, and there are some here of California." (Emphasis added.)

When the Amended Complaint was filed after these repeated discussions and instructions on diversity jurisdiction—and the required allegations were still absent—respondents could only conclude that they were not made because they could not be made. The court came to this same conclusion [C. T. p. 54].

Further enlightenment on the diversity issue is found in the comments of counsel for respondents at the hearing of January 6, 1964 [C. T. p. 28]. Petitioner could have amended his complaint at any time during the proceeding since respondents never filed a responsive pleading — motions not being considered as such for purposes of amendment. On April 12, 1963, the Court so instructed petitioner [C. T. p. 16]:

> "The Court: But you haven't made a motion to amend. You can amend. Since the defendants have not answered you can amend at any time."

In this statement one finds a most generous attitude being taken by the Court. The Court took into consideration the possibility of allowing a Second Amended Complaint as late as the time of dismissal, over a year

after suit was filed, but declined to do so for the following reasons (Petition, App. D):

> "The Court has taken into consideration the matter of dismissing the Complaint and allowing plaintiffs to again amend. But, as heretofore pointed out, this is the second chance that counsel for plaintiffs, an experienced and able lawyer, has had to make his complaint conform to the requirements for diversity, and he has failed to do so. Under these circumstances, the Court can only conclude that he cannot do so, and feels justified in dismissing the action. See: *Gunther v. San Diego & Arizona Eastern Ry. Co.* (9 Cir. Sept. 4, 1964) No. 18,724."

The facts do not support the alleged abuse of discretion in light of the opportunities afforded. The clarity with which the pertinent law was expounded leads not to the conclusion that counsel was inept, but rather that he was laboring under the handicap of factual realities which prevented him from changing his pleading. Even were it otherwise, surely respondents ought not to be dragged through months of time consuming and expensive legal meanderings only to be told to begin anew because of oversights on the part of opposing counsel. Prejudice is a two edged sword and to require respondents to backtrack at this point would be unconscionable and unjust.

The learned judge of the District Court and the able judges of the Court of Appeals had ample opportunity to review the record. With their conclusions we agree.

II.

Petitioners' Authorities Are Inappropriate and Inadequate to Support an Exercise of the Writ of Certiorari.

To begin with it is highly significant to note that petitioners have not cited a single case where the Supreme Court of the United States has granted relief similar to that requested in this Petition. In no case cited is an alleged "ineptness of counsel" the basis for reversal or remand where there is a claimed abuse of discretion.

Petitioners rely heavily on the doctrine of *Foman v. Davis,* 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) and without the benefit of factual or procedural backdrop, cite at length out of context. The holding of the *Foman* case, *supra,* is not applicable here nor is the language of dicta inconsistent with the rulings of the District Court and the Court of Appeals.

Foman involved the narrow reading by the Court of Appeals of a notice of appeal after denial of a motion to vacate under Rule 59(e) F.R.C.P. The 59(e) motion by its nature suspends the running of time within which an appeal may be perfected and as a result the original notice of appeal was ineffective because premature. The second notice failed to specifically state that appeal was from both the original order of dismissal as well as the denial of the 59(e) motion. Considering the second notice only as an appeal from the denial of the motion, the Court of Appeals considered itself precluded from finding an abuse of discretion by the trial Court in refusing to allow an amendment, since it held there was nothing in the record to show the circumstances which were before the

District Court. Mr. Justice Goldberg held for the Court that it was error to so narrowly construe the second notice and thus restrict the record on review.

In the principal case there was no question about the effectiveness of the notice of appeal. The Court of Appeals here had both the record of the dismissal proceedings *and* the 59(e) proceedings and concluded on the basis of the *entire* record (contrary to the *Foman* case, *supra,* where the Court declined to look at the dismissal record) that there had been no abuse of discretion. The *Foman* holding does not apply.

By way of dictum the Court stated that leave to amend should be "freely given" in the absence of any apparent or declared reasons. Petitioners have seized upon "undue delay", "bad faith" and "dilatory motive"—three of the "declared reasons" suggested by the Court—and proclaimed their innocence of these vices in order to bolster their argument that leave should have been granted here. Reading on in the opinion, however, one finds that "repeated failure to cure deficiencies by amendments previously allowed (and), undue prejudice to the opposing party by virtue of allowance of the amendment, . . . etc." are equally persuasive reasons for denial of amendment in the mind of the Court. We believe these latter reasons are applicable here and are more than adequately supported in the record. The dictum of the *Foman, supra,* case is convincing support for respondents.

In further discussion of the *Foman* case, *supra,* petitioners contend that it was an abuse of discretion not to take into consideration facts "outside the complaint" [Petition, p. 13] when in fact the law is clear that jurisdictional allegations must be shown affirma-

tively. Rule 8(a)(1), F.R.C.P.; *Stewart v. United States,* 109 F. 2d 517, 520 (7 Cir. 1952); *Patton v. Baltimore & O. R. Co.,* 197 F. 2d 732, 743 (3 Cir. 1952) and moreover, that jurisdictional facts must always appear on the face of the Complaint. *Haley v. Childers, etc., supra.* The partial quote from the transcript at page 14 of the Petition merely exemplifies the fact that the issue before the Court was one of allegation or pleading and not one of fact relative to the principal place of business or service of process. Inadequacy of the pleading requirement obviated the necessity to rule on the latter two grounds which were factual in nature.

Even if the Court had relied upon extrinsic evidence in the affidavits to *substitute* allegations in the Complaint the pleading would have remained defective. Diversity of citizenship must be complete. *Treinise v. Sunshine Mining Co.,* 308 U.S. 66, 71-72 (1939); *Strawbridge v. Curtiss,* 7 U.S. (3 Cranch), 267 (1806). Since a corporation has dual citizenship for jurisdictional purposes, 28 U.S.C. Sec. 1332(c); *Stenhouse v. Jacobsen,* 193 F. Supp. 694, 695-96 (N.D. Cal. 1961); *Brandt v. Bay City Super Market,* 182 F. Supp. 937, 939 (N.D. Cal. 1960) the pleading must allege the state of incorporation and the principal place of business of each and every corporate defendant. There were six defendants in the case at bar. The Complaint shows the principal place of business of none; the affidavits show the principal place of business of but three. Total diversity is absent in any event.

The remaining cases cited by petitioners are all in the Courts of Appeals and contain language similar to the dicta of the *Foman* case, *supra,* or rely directly on

that opinion. A good example is the Ninth Circuit case of *Breier v. Northern California Bowling Proprietors Ass'n,* 316 F. 2d 787 (9 Cir. 1963) which is not a case dealing with alleged ineptness of counsel. The opinion lays great stress on the *Foman* dictum, discussed at length above. Furthermore, the *Breier* Court concluded the question of amendment had not been directed to the Court's discretion as the amendment should have been granted as a matter of right—a situation contrary to our case and thus distinguishable.

In other cases cited the Court had given relief from mere technicalities at the intermediate Court of Appeals level. This is a useful and proper function of the Circuits both in relieving litigants of undue prejudice and relieving the Supreme Court from the burdens of reviewing cases of limited scope and impact beyond the particular parties involved. We do not quarrel with this role of the Circuit Courts. We are confident that such relief would have been granted by our Ninth Circuit Court of Appeals in this case had the alleged evils been present. In fact, of course, they were not and the Writ of Certiorari should be denied.

That the Court of Appeals was not in error in denying the motion to vacate under Rule 5(e) F.R.C.P. is clear. Only for an abuse of discretion by the trial Court will such an order be overturned. *Walker v. Bank of America, etc.,* 268 F. 2d 16, 25 (9 Cir. 1959) petition for rehearing denied 361 U.S. 941 (1960). The record discloses that there was no abuse of discretion.

Petitioner suggests that the swift affirmance by the Court of Appeals without opinion indicates that the record was so obtruse and confusing that the Court

never recognized the real problem sufficiently to enable it to pass on the merits.

We have greater confidence in the Ninth Circuit. It seems more plausible to respondents that the record was so patent in its mandate to the Court of Appeals that no written opinion was necessary.

Conclusion.

It is respectfully submitted that petitioners were afforded every opportunity to plead a cause in the Federal Courts. That they did not do so successfully is testimony that they could not do so in light of the true facts. The District Court did not abuse its discretion in dismissing the Complaint nor did the Court of Appeals sanction or commit new error by affirming the dismissal and denying the motion to vacate. Amendment of the complaint at this stage would cause undue prejudice to respondents.

The Writ should be denied.

Respectfully submitted,

JOHN J. QUINN, JR.,
Attorney for Respondents.